

87-1281

NO. _____

Supreme Court U.S.

FILED

DEC 17 1987

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

HUGH PENDERGRASS, Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES W. MAXFIELD
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SCHWARTZ, PARRISH &
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ATTORNEYS FOR PETITIONER



Questions Presented

After nearly twenty-one years of military service Petitioner retired from the United States Air Force and began drawing his military pension. Soon thereafter, Petitioner was appointed to a position in the Civil Service. Petitioner continued working for the Civil Service for approximately ten years before applying for disability retirement under the Civil Service retirement system. Petitioner then elected to receive Civil Service retirement pay that credited him for both his years of military service and Civil Service in lieu of receiving retirement pay from the Armed Forces. Subsequently, Petitioner and his spouse divorced and, pursuant to the Decree of Dissolution of Marriage, the aggregate monthly sum of \$634.00 was ordered to be withheld from the \$682.44 portion of Petitioner's monthly retirement pay which was attributable to his military service. After Petitioner's former spouse served the order for withholding on the

Office of Personnel Management, Petitioner was notified that \$634.00 would be withheld from his monthly retirement pay. The decision of the Office of Personnel Management was affirmed on appeal by the Merit Systems Protection Board, and the latter decision was affirmed on appeal by the United States Court of Appeals for the Federal Circuit. The questions presented are:

1. Whether the protections afforded to a military service member under 10 U.S.C. §1408(e)(1), which provides, inter alia, that no greater than fifty percent of a serviceman's pay may be levied for alimony, child support or similar court-ordered garnishment, extend to a former serviceman who opts to receive Civil Service retired pay in lieu of military retired pay.
2. Whether the allowance of withholding of ninety-two percent of Petitioner's retirement pay attributable to his

military service violates the Due Process Clause of the Fifth Amendment to the United States Constitution by treating those members of the armed services who have elected to receive Civil Service retirement pay in lieu of military retirement pay differently than similarly situated armed services personnel who simply elect to receive military retirement pay.

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Federal Circuit are listed in the caption.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

HUGH PENDERGRASS, Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

James W. Maxfield, on behalf of Hugh Pendergrass, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals (App. A), infra is not reported. The

opinion of the Merit Systems Protection Board (App. B), infra is not reported. The Decree of Dissolution of Marriage (App. C), infra is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall be...deprived of life, liberty, or property, without due process of law.

2. Section 8332 of title 5, United States Code provides in relevant part:

§8332 Creditable service:

...(c) Except as provided by subsection (d) of this section, an employee or Member shall be allowed credit for periods of military service before the date of the

separation on which title to annuity is based. However, if an employee or Member is awarded retired pay on account of military service, his military service may not be credited unless the retired pay is awarded--

(1) on account of a service-connected disability-

(A) incurred in combat with an enemy of the United States; or

(B) caused by an instrumentality of war and incurred in line of duty during a period of war as defined by section 301 of title 38; or

(2) under chapter 67 of title 10.

3. Section 8345 of title 5, United States Code, provides in relevant part:

5 U.S.C. §8345 Payment of benefits; commencement, termination, and waiver of annuity...

(j)(1) Payments under this subchapter

which would otherwise be made to an employee, Member, or annuitant based upon his service shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery by any other person....

4. Section 1408 of title 10, United States Code provides in relevant part:

10 U.S.C. §1408

(a) In this section:

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which

a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title)...

(5) "Member" includes a former member.

(d)(1) After effective service on the Secretary concerned of a court order with respect to the payment of a portion of the retired or retainer pay of a member to the spouse or a former spouse of the member, the Secretary shall, subject to the limitations of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court

order, such payments shall begin not later than 90 days after the date of effective services. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay....

- (e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

STATEMENT

Mr. Hugh Pendergrass ("Petitioner") served on active duty in the United State Air Force for approximately 21 years and received an Honorable Discharge on June 30, 1959. There-

after, Petitioner began receiving a military retirement pension. On April 8, 1966, Petitioner was appointed to a position in the Civil Service. Petitioner continued working for the Civil Service for approximately ten years before applying for disability retirement under the Civil Service retirement system, under which Petitioner elected to receive Civil Service retirement pay that credited him for both his years of military service and Civil Service in lieu of receiving retirement pay from the Armed Services. See 5 U.S.C. §8332(c) (1976).

On November 15, 1983, a Decree for Dissolution of Marriage ("Decree") between Petitioner and his spouse was issued in the Superior Court for the State of Arizona. The Decree provided for the division of their property to the extent that Petitioner was ordered to pay, among other things, to his former spouse: (1) 41.66 percent of his \$682.44 monthly military retirement benefits, which percentage equals the sum of \$284.30; and

(2) \$350.00 per month as permanent spousal maintenance (App. C). In the case of both items, the Court directed the appropriate U.S. Government finance office to withhold from Petitioner's retirement fund and pay directly to Petitioner's former spouse the aggregate monthly sum of \$634.40. The Decree, however, awarded Petitioner the disability portion of his retirement benefits as his sole and separate property. As such, by statute that portion of the retirement pay considered to be disability pay is excluded from consideration as disposable retired pay subject to levy, garnishment, attachment or alienation from the service member. 10 U.S.C. §1408(a)(4) (1982); See Inzinna v. Inzinna, 456 So.2d 691 (La. Ct. App. 1984).

On June 20, 1985, Petitioner filed, In propria persona, a petition for review with the Court of Appeals for the State of Arizona of the Decree. In that petition, Petitioner sought review of the trial court's order regarding payment to Petitioner's former spouse from his

retirement funds. Thereafter, the Arizona Court of Appeals issued a decision which affirmed, in all respects, the judgment of the trial court.

On October 8, 1985, Petitioner's former spouse filed a copy of the Decree with the Office of Personnel Management and requested that the Arizona court's directive regarding the apportioning of Petitioner's retirement annuity and payment to her of the specified amount be initiated immediately. On October 11, 1985, the Office of Personnel Management divided the retirement benefits, as ordered by the Arizona court, and sent notice to Petitioner advising him of the action and of his right to file a protest to the apportionment (App. D). In response, Petitioner indicated that he was currently seeking review of the matter before the Supreme Court of the United States. Based on this information, the Office of Personnel Management suspended disbursement of the apportioned funds until Petitioner had exhausted this avenue of judicial review. On

July 8, 1986, the Office of Personnel Management advised the parties that it had been notified that Petitioner's petition for review had been denied by the United States Supreme Court, and that it was going to proceed with the enforcement of the apportionment of Petitioner's benefits (App. E).

Subsequently, Petitioner timely filed for reconsideration of the Office of Personnel Management decision. The Office of Personnel Management affirmed its prior decision (App. F), and Petitioner timely appealed to the Merit Systems Protection Board ("Board"). In the action before the Board, Petitioner contended that the aggregate sum of \$634.30 which was being withheld from Petitioner's monthly retirement annuity exceeded the fifty percent withholding maximum prescribed by 10 U.S.C. §1408(e)(1). Though Petitioner acknowledged that he had elected to receive a more sizeable Civil Service disability retirement annuity than was available under his military retirement plan, the Decree awarded the disability

portion of his retirement to Petitioner as his separate property and ordered that the aggregate sum of \$634.30 of Petitioner's \$682.44 monthly retirement pay attributable to his military service be withheld by the Office of Personnel Management. Accordingly, Petitioner contended that the Arizona court order, which was enforced by the Office of Personnel Management, awarded to Petitioner's former spouse approximately ninety-two percent of his monthly military retirement pay in violation of 10 U.S.C. §1408(e)(1).

The Board disagreed, noting that the protections afforded to the retired pay of a member of the armed services pursuant to 10 U.S.C. 1408(e)(1) do not apply to the withholding of Civil Service retirement pay which is governed by 5 U.S.C. 8345(j) (App. B). The Board failed to recognize, however, that the sums ordered to be withheld were to be withheld from that portion of Petitioner's retirement pay attributable to his military service and not from the portion of Petitioner's retirement

pay attributable to his disability retirement from the Civil Service. By failing to distinguish the source of the funds subject to withholding, Petitioner contends that the Board erred in finding that the provisions of 10 U.S.C. §1408(e)(1) did not apply to limit the withholding allowable to Petitioner's former spouse to an amount equal to fifty percent of his retirement pay attributable to his military service.

Subsequently, the Board's decision became final on the 17th day of February, 1987 and on the 10th day of March, 1987, Petitioner petitioned for review of the Board's decision to the Court of Appeals for the Federal Circuit. In an unpublished opinion, the Court of Appeals affirmed the Board's decision on the 27th day of October, 1987 (App. A). Petitioner then filed this Petition for Writ of Certiorari with this Court.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the protection accorded to the

retired pay of a former military service member who elects to receive Civil Service disability retirement benefits which credit the former service member's military service in the computation of his retirement benefits. The Office of Personnel Management, as affirmed by the Merit Systems Protection Board and the Court of Appeals for the Federal Circuit, concluded that Petitioner's election to receive Civil Service retirement benefits in lieu of military retired pay effectively waived the protection otherwise accorded to his military retirement pay pursuant to 10 U.S.C. §1408(e)(1).

The Court of Appeals' decision involves an important question of federal law which has not been, but should be, settled by this Court. In addition, the decision of the Court of Appeals conflicts with sound policy considerations set forth by this Court and by Congress for the protection of a former service member's retirement pay attributable to years of military service.

In McCarty v. McCarty, 452 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), this Court concluded that the retired pay of a military service member was not subject to attachment in the context of a community property division incident to divorce. In McCarty, the Court recognized that "the military retirement system is designed to serve as an inducement for enlistment and re-enlistment, to create an orderly career path, and to ensure 'youthful and vigorous' military forces." Id. 453 U.S. at 234. The Court also noted that "retired pay is one of the inducements selected to make military service attractive..." Id. 453 U.S. at 234. Although the McCarty decision was subsequently emasculated by the enactment of 10 U.S.C. §1408 (1982), the fifty percent limitation embodied under subsection (e)(1) of the statute reflects a carefully calculated scheme which balances the needs of former spouses and minor dependents of military personnel against the policy considerations outlined by the Court in McCarty.

In the case at bar, the crucial question presented to this Court is the interplay between two federal statutes, 10 U.S.C. §1408 and 5 U.S.C. §8345(j). Both statutes deal with the ability of administrative agencies to withhold monies from a monthly retirement fund for purposes of honoring court orders for the division of community property and spousal support. In the case of 10 U.S.C. §1408, the retired pay involves that of a military retired member. In contrast, 5 U.S.C. §8345(j) concerns withholdings from Civil Service retired pay. It is clear that under both statutes the respective agencies are permitted to make withholdings based upon state court orders. In the case of 10 U.S.C. §1408(e)(1), however, there exists a limitation that such withholding not exceed fifty percent of a member's disposable retired or retainer pay. Such limitation is concededly not found within 5 U.S.C. §8345(j).

Petitioner contends that the restrictions of Section 1408 apply to limit the withholding of his retirement pay attributable to military

service because Section 1408 defines a "member" of the Armed Services to include a "former member." 10 U.S.C. §1408(a)(5)(1982). Simply because Petitioner, subsequent to his retirement, opted to receive Civil Service disability retirement pursuant to 5 U.S.C. §8332(c)(1976) should not negate the protections afforded under Section 1408(e)(1) to former members of the Armed Forces. To do so results in a violation of administrative due process since the action of the Office of Personnel Management, as affirmed by the Merit Systems Protection Board, results in the withholding of over ninety-two percent of Petitioner's retired pay attributable to his military service. This result is directly contradictory to the intent of the statute and is detrimental to the continued morale of the Armed Forces who serve their country in anticipation of the receipt of their retired pay. This reason was the very basis for the limitations placed within the statute as anticipated by Congress:

[I]t is expected that Section

1408 will become the preferred and predominant method of involuntarily collecting child support and alimony obligations. ... However, it is also not the intent of the bill that garnishment provisions of §459 (Social Security Act) and the collection provisions of Section 1408 operate separate and independent of each other so that a retired member could potentially be deprived of 100% of retired retainer paid.

S. Rep. No. 97-502, 97th Cong., 2d Sess. 20 (1982), reprinted in U.S. Code Cong. & Ad. News 1596, 1615-16. Accordingly, Petitioner believes that the Office of Personnel Management should have restricted maximum withholdings from his retired pay to an amount equal to fifty percent of his gross retired pay. Petitioner's waiver of military retired pay in favor of Civil Service retirement pay pursuant to 5 U.S.C. §8332(c) (1976) should not act to waive any rights he had under law to maximum withholdings and the withholding of such denies him administrative due process to the extent of any excess withholdings over and above the fifty percent limitations prescribed by 10 U.S.C. §1408(e)(1).

The action of the Office of Personnel Management, as affirmed by the Merit Systems Protection Board, also provides for disparate treatment of similarly situated military retirees in violation of the Due Process Clause of the Fifth Amendment to the Constitution. Cf. Jacobson v. Tahoe Regional Planning Agency, 558 F.2d 928, 936-37 (9th Cir. 1977), superceded, 566 F.2d 1353 (9th Cir. 1979), aff'd in part and rev'd in part sub. nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S.Ct. 1171, L.Ed.2d (1979) (agency created by federal law and deriving authority from legislative powers conferred upon Congress by the Constitution is within reach of the Due Process Clause of Fifth Amendment); Galvan v. Press, 347 U.S. 522, 529, 74 S.Ct. 98 L.Ed. 911 (1954) (Due Process Clause of Fifth Amendment bars federal legislation embodying a baseless classification). In that regard, a twenty year service member who retires and selects military retirement has his retirement pay protected by the fifty percent

limitation prescribed by Section 1408(e)(1). In contrast, a twenty year service member who retires and who subsequently is employed by the Civil Service and selects Civil Service retirement which credits the service member's military service in the computation of his retirement benefits is afforded no protection for that portion of his retirement pay attributable to military service. In the latter case, the former service member may conceivably be denied his entire retired pay even though the majority of such pay is owing to the service member on account of his military service. Petitioner contends that the construction of such statutes by the Office of Personnel Management and Merit Systems Protection Board provides for disparate treatment of similarly situated retired service members without a rational basis for such treatment in violation of the Due Process Clause of the Fifth Amendment of the Constitution.

CONCLUSION

The petition for writ of certiorari should
be granted.

STUDDARD, MELBY,

SCHWARTZ, PARRISH &

MAXFIELD

415 N. Mesa, Third Floor

P.O. Box 2626

El Paso, Texas 79999

(915) 533-5938

BY: 

JAMES W. MAXFIELD

ATTORNEYS FOR PETITIONER

DECEMBER 1987

CERTIFICATE OF SERVICE

I, JAMES W. MAXFIELD, hereby certify that three true and correct copies of the above and foregoing document has been mailed to the following:

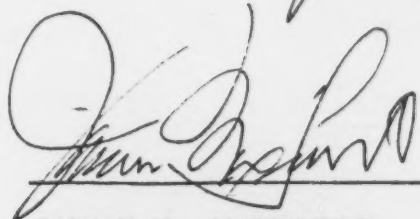
Mr. Paul J. Ehlenback
Attorney for Respondent
Department of Justice
Civil Division, Commercial
Litigation Branch

ATTN: CLASSIFICATION UNIT, 2ND FLOOR,
TODD BLDG.

Washington, D.C. 20530

Solicitor General
Department of Justice
Washington, D.C. 20530

DATED this the 21st day of January,
1987.

A handwritten signature in dark ink, appearing to read "James W. Maxfield", is written over a horizontal line.

JAMES W. MAXFIELD

1a

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-3342

HUGH PENDERGRASS,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). DE0831860504 This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED:

AFFIRMED.

ENTERED BY ORDER OF THE
COURT

DATED OCT 27 1987

/s/

FRANCIS X. GINDHARD,
CLERK

ISSUED AS A MANDATE: November 17, 1987

COSTS: Against, Petitioner

APPENDIX A

2a

PRINTING ----- \$169.76

TOTAL ----- \$169.76

APPENDIX A

NOTE: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

87-3342

HUGH PENDERGRASS,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

DECIDED: October 27, 1987

Before FRIEDMAN, SMITH, and MAYER, Circuit
Judges.

PER CURIAM.

APPENDIX A

The initial decision of the Merit Systems Protection Board (board), which decision became final on February 17, 1987, docket No. DE0831860504, sustained the determination by the Office of Personnel Management to withhold a portion of Hugh Pendergrass' retirement annuity, which withheld portion was transferred to his former wife. On the basis of the administrative judge's opinion, dated January 13, 1987, the board's decision is affirmed.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER REGIONAL OFFICE

HUGH PENDERGRASS,)	DOCKET NUMBER:
)	
Appellant,)	DE0831860504
)	
v.)	
)	
OFFICE OF PERSONNEL)	DATED: <u>JAN 13 1987</u>
)	
MANAGEMENT,)	
)	
Respondent/)	
)	
Agency.)	
)	
(CSA 1 918 188))	
)	

James W. Maxfield, Esquire, El Paso, Texas, for the appellant.

Raymond J. Kirk, for the agency.

BEFORE

Joseph H. Hartman, Administrative Judge

INITIAL DECISION

INTRODUCTION

On September 22, 1986, appellant appealed from the reconsideration decision issued by

the agency which resulted in the withholding, by the agency, of a portion of his retirement annuity which was then to be paid to his former spouse. At the time the decision was issued (September 3, 1986), appellant resided in the State of Arizona.

While appellant was notified of his right to have a hearing on this matter, he did not request one within the time allowed. Thereafter, the parties were notified of the date set for the closing of the record and the right to file additional arguments and/or evidence prior to that date. The decision in this matter will be based on the documents of record.

For the reasons to be set forth in this decision, the agency's action, as set out in its reconsideration decision, is AFFIRMED.

ANALYSIS AND FINDINGS

The undisputed evidence of record show that appellant has served approximately 21 years in the military and was entitled to

APPENDIX B

retirement, under the military retirement retirement [sic] system, for that service. Appellant was appointed to a civil service position after he retired from the military, and he had approximately 10 years of Federal Civil service under the civil service retirement system when he applied for disability retirement through the Office of Personnel Management (agency) on February 10, 1976. Appeal File at Tab 4.

The agency informed appellant that his request for disability retirement would be granted provided he was willing to waive his military retirement entitlement. On June 1, 1976, appellant informed the agency, in writing, that the was going to waive his military retirement in order to receive the disability retirement annuity under the civil service retirement system, effective August 31, 1976. Appellant's application for disability retirement was granted and effected on August 31, 1976. Appeal Filed at Tab 4.

APPENDIX B

On November 15, 1983, a Decree for Dissolution of Marriage between appellant and his spouse (Bertha) was issued in the Superior Court for the State of Arizona. Further, the decree provided for the division of their property to the extent that appellant was ordered to pay, among other things, to Bertha: (1) 41.66 percent of \$682.44 from his monthly retirement benefits; and (2) \$350.00 per month as permanent spousal maintenance. In the case of both items, the Court directed the appropriate U.S. Government finance office to withhold from appellant's retirement fund and pay directly to Ms. Bertha Pendergrass the correct amount due her, which in this case was \$634.30. Appeal File at Tab 4.

On June 20, 1985, appellant filed, In propria persona, a petition for review with the Court of Appeals for the State of Arizona of the trial court's divorce decree. In that petition, appellant sought review, among other things, of the trial court's order regarding

payment to Ms. Bertha Pendergrass from his retirement funds. Thereafter, the Court of Appeals issued a decision which affirmed, in all respects, the judgment of the trial court. Appeal File at Tab 4.

On October 8, 1985, Ms. Bertha Pendergrass filed a copy of the divorce decree with the agency and requested that the court's directive regarding the apportioning of appellant's retirement annuity and payment to her of the specified amount be initiated immediately. On October, 11, 1985, the agency divided the retirement benefits, as ordered by the court, and sent a letter to appellant advising him of the action and of his right to file a protest to the apportionment. In response, appellant indicated that he was currently seeking review of the matter before the Supreme Court of the United States. Based on this information, the agency suspended disbursement of the apportioned funds until appellant had exhausted this avenue of

judicial review. On July 8, 1986, the agency advised the parties that it had been notified that appellant's petition for review had been denied by the Supreme Court, and it was going to proceed with the enforcement of the apportionment of appellant's benefits. Thereafter, appellant filed for reconsideration by the agency, as previously stated, which resulted in his appeal to the board.

In appealing this matter to the Board, appellant asserts that the Courts, which have rendered decisions on the matter, as well as the agency (OPM) have acted in a manner contrary to the dictates of 10 U.S.C. § 11408 in that they have either ordered or have withheld approximately 92 percent of his retirement benefits for disbursement to Bertha Pendergrass. Appellant avers that the law, specifically section 1408(e)(1) of the United States Code, Title 10, restricts apportionment of appellant's disposable retirement benefits to 50 percent or less. While appellant

concedes that he is no longer receiving military retirement benefits, he contends that since he qualifies as a retired military member, albeit under the civil service retirement law, the restriction under section 1408(e)(1) should still apply to his situation.

Further, appellant claims that the agency, in applying the 41.66 percent to his retirement annuity, has miscomputed the amount due Bertha Pendergrass. Appellant stated that the agency had overpaid him, due to a computation error, and it was presently recovering the amount of overpayment by reducing the annuity he is scheduled to receive for the next 36 months. Appellant contends that his reduction in annuity is not reflected in the amount that Bertha Pendergrass is receiving.

In responding to the matters raised by appellant, the agency has asserted that its position is fully explained in the reconsid-

eration decision, and it did not submit any new evidence or argument on the issues at hand. In essence, the agency is relying on the evidence acquired during its consideration of appellant's case during the processing of his request for reconsideration and subsequently provided to the Board in response to the instant appeal.

Under 5 U.S.C. § 8345(j) a civil service annuity payment which would otherwise be made to an annuitant will be paid by the agency to another person "if and to the extent expressly provided for in the terms of any court decree of divorce, or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation." The regulations implementing this statute define court order and qualifying court order. 5 C.F.R. § 831.1702-03 (1986). The regulations, at 5 C.F.R. § 831.1709(a)(2), provide that the former spouse's claim will be denied whenever it is shown that:

(i) the court is not a qualified court order; or,

(ii) the court order is inconsistent with a contemporaneous or subsequent court order.

Neither the statute nor the regulations established the scope of review by the Board concerning the provisions of the the [sic] divorce decree; however, it has been considered in previous court cases, and those cases have held that state law and orders are binding on other jurisdictions in the area of divorce. See, for example, Sosna v. Iowa, 419 U.S. 393, 404, 42 L. Ed. 2d 532 (1975). Therefore, I find that the scope of review for the Board must be limited to the issues stated in 5 C.F.R. §831.1709(a)(2).

The record in this matter contains a copy of a divorce decree rendered by the Superior Court for the State of Arizona wherein the Court has ordered the agency to pay a specific monetary amount and/or a specific percentage of a sum certain of appellant's retirement

benefits to appellant's former spouse. This amount is readily ascertainable. There is no evidence to show that any contemporaneous or subsequent court order has been rendered which is contrary to or inconsistent with the Trial Court's order on the matter at issue.

Regarding the facts in this case, it is evident that appellant chose to waive any claim he had to a military retirement annuity in order to receive a disability retirement annuity under the civil service retirement system. The two retirement systems are not governed or administered under the same laws. Moreover, the laws referred to by appellant, in support of his position, are found in title 10 of the United States Code. This particular title deals with the military retirement system. The laws governing the civil service retirement system are found in title 5 of the United States code. Appellant has presented no evidence, nor am I aware of any such provision, to support his position that the

restrictions referred to by appellant which are found in title 10 are applicable to annuitants receiving benefits under the civil service retirement system. Therefore, I find that appellant's argument that he is still covered by those restrictions is without merit.

Furthermore, as pointed in the decision rendered by the Court of Appeals for the State of Arizona, the provisions pertaining to deductions from his retirement benefits were reached by joint stipulation between appellant and Bertha Pendergrass prior to hearing at the trial level. The only action taken by the trial court was to formally approve and record the agreement reached by the parties in its judgment on the petition for dissolution of the marriage. Appellant has presented no argument which would justify relieving him of those particular provisions of the decree, even if the Board had the authority to do so.

In summary, I find that the preponderance

of the evidence shows that the agency acted within its authority when it apportioned and withheld the amounts specified in the divorce decree from appellant's retirement benefits. In fact, the agency was obligated to apportion the amount identified by the state court in the divorce decree. Dargel v. Office of Personnel Management, 20 M.S.P.R. 48 (1984).

It is noted that appellant has also questioned the correctness of the amount being withheld on the basis that his monthly annuity has been reduced for approximately 36 months to facilitate recovery by the agency of an overpayment in benefits which were made to him. He also claims that no change has been made to the amount being withheld for Ms. Bertha Pendergrass. Appellant asserts that his ex-spouse should also have a reduction in the amount she is receiving. Appellant's argument is also without merit on this matter. The amount established by the court is very specific, and the agency has no authority to

vary that amount. Therefore, the amount being withheld by the agency is correct.

Moreover, I further find that the board has no authority to review appellant's arguments about the alleged inequities of the state court order. Appellant's recourse is to ask the Superior Court for the State of Arizona to reconsider or modify the existing decree, if such action is warranted.

DECISION

The agency reconsideration decision is AFFIRMED.

REVIEW RIGHTS

This initial decision of the Merit Systems Protection Board will become a final decision of the Board on Feb 17 1987, unless a petition for review is filed by that date or the Board reopens the case on its own motion.

51 Fed. Reg. 25, 157-59 (to be codified at 5

C.F.R. §§ 1201.113-117).^{*} Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing a petition for review with:

Office of the Clerk

Merit Systems Protection Board

1120 Vermont Ave., N.W.

Washington, D.C. 20419

in accordance with 5 C.F.R. § 1201.114. The parties should note that, effective August 1, 1985, they are now required to serve any petition for review and any subsequent pleadings on all other parties. The petition for review must be filed on or before Feb 17 1987 and must set forth objections to the initial decision, supported by references to applicable laws, regulations, and the record.

* On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

Any appellant adversely affected or aggrieved by a final decision of the Board may file a petition with the United States Court of Appeals for the Federal Circuit, if the Court has jurisdiction. 5 U.S.C. § 7703. A petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the court within 30 days after the Board's decision becomes final. Petitions must be sent to:

U.S. Court of Appeals for the Federal Circuit
717 Madison Place, N.W.

Washington, D.C. 20439

FOR THE BOARD:

/s/
Joseph H. Hartman

Administrative Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this MSPB initial decision were served today by regular mail on the individuals identified below.

Hugh Pendergrass
Route 1, Box 57
McNeal, AZ 85617

James W. Maxfield
Attorney at Law
4171 N. Mesa, Suite C-206
El Paso, TX 79902

Retirement Policy Division
Office of Retirement & Ins. Policy
Retirement and Insurance Group, OPM
Box 16
Washington, DC 20044

Office of Personnel Management
Attn: Appellate Policies Branch
1900 E Street, NW, Room 7635
Washington, DC 20415

Jan 13 1987

/s/

Vicky J. Boiko

21a

Administrative Officer

Denver Regional Office



22a

FILED

C.C. NEWMAN

CLERK OF THE SUPERIOR COURT

1983 NOV 15 AM 9:48

YUMA COUNTY, ARIZONA

BY: _____

DEPUTY

1 JENSEN & IRWIN, P.C.

ATTORNEYS AT LAW

888 W. 16TH STREET

POST OFFICE BOX 5178

2 YUMA, ARIZONA 85364-0602

3 (602) 783-7631

4 ATTORNEYS FOR PETITIONER

5
6
7
8 IN THE SUPERIOR COURT OF THE STATE

OF ARIZONA

APPENDIX C

9 IN AND FOR THE COUNTY OF YUMA

10 In re the Marriage)

of)

11 BERTHA PENDERGRASS,) CIVIL ACTION NO.

) 45471

12 Petitioner,) DECREE FOR DISSOLU-

) TION OF MARRIAGE

13 and)

14 HUGH PENDERGRASS,)

15 Respondent.)

16 This matter coming on for trial on
17 May 26, 1983, and the petitioner being
18 present and represented by counsel, Jay
R. Irwin, and the respondent being
19 present and represented by counsel, Doug
Stanley, and after testimony and evidence
20 being presented, the Court finds that
both parties have been domiciled in
21 Arizona and such domicile had been
maintained for ninty [sic] (90) days
22 prior to the date of filing; that the
marriage is irretrievably [sic] broken;

23 and that the parties have no minor children.

30 DOCKETED PAGE P. 9 BOOK 11

STATE OF ARIZONA)

COUNTY OF YUMA) ss.

I, C.C. Newman, Clerk of the Superior Court of Yuma County, State of Arizona, hereby certify that I have compared the foregoing copy with the original Decree in the above entitled #45471 filed in my office of the 15 day of November 1983 and the same is a true copy of the original and of the whole thereof.

WITNESS my hand and the seal of said County, this 9 day of January, 1984.

C.C. NEWMAN, Clerk

BY: Marie Douglas 15

Deputy Clerk

JENSEN & IRWIN, P.C.

ATTORNEYS AT LAW

888 W. 16TH STREET

POST OFFICE BOX 5178

YUMA, ARIZONA 85364-0602

25a

1 IT IS, THEREFORE, OR-
DERED, ADJUDGED and DECREED
2 as follows:

3 1. That the marriage is
irretrievably [sic]
4 broken and a decree
5 of dissolution shall
be granted.

2. That the parties own
the following commu-
nity property:

6 a. Residence in Yuma
7 and furnishings

8 b. Real Property in
La Paz County

9 c. United Bank
Account

d. Ft. Rucker Credit
Union Account

10 e. Various Stocks
and Bonds

11 f. United Time

APPENDIX C

Certificate of Deposit

- 12 g. Pinto Automobile
- 13 h. Van
- 14 i. Various items of mechanical
equipment
- j. Retirement benefits from the
U.S. Government
- 15 3. That the Respondent owns as his
separate property:
 - 16 a. All other bank accounts
 - 17 b. All other real property
 - 18 c. Disability protion [sic] of
retirement
- 19 4. That the property shall be di-
vided as follows:
 - 20 a. Real property in Yuma County
and La Paz Counties legally
described as: Lot 23, Block
21 13, PALMCROFT ESTATES NO. 3
according to the Amended

27a

22

Plat of record in Book 3 of
Plats, Page 124, Records of

23

Yuma County, Arizona;

JENSEN & IRWIN, P.C.

ATTORNEYS AT LAW

888 W. 16TH STREET

POST OFFICE BOX 5178

YUMA, ARIZONA 85364-0602

28a

1 and, The South
2 half of the
3 Northwest
4 quarter of the
5 Southwest
6 quarter of
7 Sec. 34, T5N,
8 R15W.

Reserving unto
the sellers
the right to
dedicate the
North, South
and East 15
feet to Yuma
County for
Road, is to be
sold and the
proceeds even-
ly divided be-
tween the par-
ties after the

9 payment of all costs of sale
including any real estate
commissions.

b. Each party shall receive one
half of:

- 10 1. United Bank Account
- 11 2. Ft Rucker Credit Union
Account
- 12 3. All stock and bonds
- 13 4. United Time Certificate
of Deposit

c. Petitioner to have all furni-
14 ture, fixtures and appliances
in the residence.

d. Respondent to have the Pinto,
15 the Van, all mechanical
16 equipment and his separate
17 property.

e. The Petitioner shall receive
18 41.66% of the sum of \$682.44,
19 \$284.30 from respondents re-
20 tirement benefits, that sum

30a

to be paid directly to the
petitioner by the proper
finance office of the U.S.
Government.

5. That the Respondent shall pay to
the petitioner the sum of \$350.00 per
month as permanent spousal maintenance,

APPENDIX C

JENSEN & IRWIN, P.C.

ATTORNEYS AT LAW

888 W. 16TH STREET

POST OFFICE BOX 5178

YUMA, ARIZONA 85364-0602

31a

1 the respondent to authorize
2 this sum to be deducted
3 from his retirement and
4 sent directly to the peti-
5 tioner. If the Respondent
6 does not authorize the de-
7 duction then it is ordered
8 that the sum be paid di-
9 rectly to the petitioner by
10 the Proper Finance Office
11 of the Untied States
Government.

6. That each party
shall bear their own costs
and attorneys fees.

DATED this 15th day of
November, 1983.

JUDGE OF THE SUPERIOR COURT
LODGED with the Clerk
of the Court this

_____ day of

APPENDIX C

32a

12 _____, 1983.

13

14 COPY of the foregoing

mailed this 28th day

15 of October, 1983 to

Hugh Pendergrass

16 RT 1, Box 57C

McNeal, AZ 85617

17

18

19

20

21

22

23



33a

OCT 11 1985

CSA:CDS:jl

RE: CSA 1 918 188

Hugh Pendergrass
Rt. 1, Box 57 C
McNeal, AZ 85617

Dear Mr. Pendergrass:

This notice is to inform you that the Office of Personnel Management has received a court order intending to award a portion of your annuity to Bertha Pendergrass. The Office of Personnel Management intends to honor this order.

Public Law 95-366 (section 8345(j) of title 5, United States Code) requires the Office of Personnel Management to divide retirement benefits to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court approved property

APPENDIX D

settlement agreement incident to any court decree of divorce, annulment, or legal separation.

Based on the preliminary review required by 5 C.F.R. 831.1707, we have determined that the court decree appears to be a qualifying court order. The court decree requires us to withhold \$634.30 from your annuity for payment to your former spouse. Withholding will begin from your November 1, 1985 annuity check.

If you know of any reason why we should not comply with the court's directive, you should inform this office within thirty days of the date of this letter. Payments to your former spouse are scheduled to begin after that thirty day period has expired.

A copy of the court decree ordering the apportionment of your retirement benefits, and a copy of the Office of Personnel Management regulations pertaining to procedures for reviewing your objections and the requirements

35a

for a qualifying court order are enclosed for
your information.

Hugh Pendergrass

2

Please address all future correspondence or submissions pertaining to this matter to the following address:

Office of Personnel Management
Allotment Section
P.O. Box 17
Washington, D.C. 20044

Sincerely yours,

Paralegal Specialist
Allotment Section
Annuitant Services Branch

37a

JUL 8 1986

CSA:CDS:LH

RE: Hugh Pendergrass vs.
Bertha Pendergrass

Mr. James W. Maxfield, Esquire
4171 N. Mesa, Suite C-206
El Paso, Texas 79902

Dear Mr. Maxfield:

Mr. Jay R. Irwin, counsel to Mrs. Bertha Pendergrass has furnished us a copy of the attached letter addressed to you from the Supreme Court of the United States concerning your petition for certiorare [sic]. Since review has been denied by the Supreme Court of the United States and a timely appeal to the Supreme Court of Arizona seems remote, we will now enforce the apportionment of Mr. Pendergrass' retirement benefits as ordered by the Superior Court of the State of Arizona in

APPENDIX E

the parties' decree-- of dissolution of marriage.

You may request reconsideration of this decision. A request for reconsideration must be in writing and state the reasons which lead you to believe this decision is in error. Your request must be filed within 30 days of the date of this letter. Please provide the annuitant's social security number and date of birth with the request. Send your request to the following address:

U.S. Office of Personnel Management
Employee Service and Records Center
P.O. Box 17

Boyers, PA 16017

Attention: Court-Ordered Apportionment

Furnish a copy of your request to:

U.S. Office of Personnel Management
Allotment Section

P.O. Box 17

Washington, D.C. 22041

withholding will continue during the 30-day period. If no request for reconsideration is received at the end of the 30-day period, payment of funds owing to Mrs. Pendergrass will be authorized.

Sincerely yours,

Paralegal Specialist

Allotment Section

Annuitant Services Branch

cc: Hugh Pendergrass

Jay R. Irwin, Esquire



40a

SEP 3 1986

CRR:RW:mh CSA 1 918 188

Mr. Hugh Pendergrass
c/o Mr. James W. Maxfield
Attorney at Law
4171 North Mesa, Suite C-206
El Paso, Texas 79902

Dear Mr. Pendergrass:

This is in reply to your request for reconsideration concerning your objection to the apportionment of your civil service retirement benefits.

The section of the Civil Service Retirement law which governs apportionment of annuities, 5 USC 8345(j), states in pertinent part:

"(j)(1) Payments under this subchapter which would otherwise be made to an employee, Member, or annuitant based upon his service shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal

APPENDIX F

separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery by any other person.

Pursuant to 5 U.S.C. 8345(j), the Office of Personnel Management promulgated the following regulation at 5 CFR 831.1704.

§831.1704 Qualifying court orders.

(a) A former spouse is entitled to a portion of an employee's retirement benefits only to the extent that the division of retirement benefits is expressly provided for by the court order. The court order must divide employee retirement benefits, award a payment from employee retirement benefits or award a former spouse annuity.

(b) The court order must state the former spouse's share as a fixed amount, a percentage or a fraction of the annuity, or by a formula that does not contain any variables whose value is not readily ascertainable from the face of the order or normal OPM files.

(c)(1) For purposes of payments from employee retirement benefits, OPM will review court orders as a whole to determine whether the language of the order shows an intent by the court that the former spouse should receive a portion of the employee's retirement benefits directly from the United States.

(i) Orders that direct or imply that OPM is to make payment of a portion of employee retirement benefits, or are neutral about the source of payment, will be honored unless the retiree can demonstrate that the order is invalid in accordance with §831.1709.

(ii) Orders that specifically direct the retiree to pay a portion of employee retirement benefits to a former spouse (and do not contain language to show the court intends payment from the Civil Service Retirement System) will be

honored unless the retiree objects to direct payment by OPM within the 30-day notice period prescribed in §831.1708, but will not be honored even if the retiree raises only a general objection to payment by OPM within that 30 day notice period.

(2) For purposes of awarding a former spouse annuity, the court order must either state the former spouse's entitlement to a survivor annuity or direct an employee, Member, or retiree to provide a former spouse annuity.

The pertinent part of your decree of divorce reads as follows:

"The petitioner shall receive 41.66 percent of the sum of \$682.44, \$284.30 from respondents retirement benefits, that sum to be paid directly to the petitioner by the proper finance office of the U.S. Government.

That the respondent shall pay to the petitioner the sum of \$350.00 per month as permanent spousal maintenance, the respondent to authorize this sum to be deducted from his retirement and sent directly to the petitioner. If the respondent does not authorize the deduction then it is ordered that the sum be paid directly to the petitioner by the proper finance office of the United States Government."

Under 5 CFR 831.1717, in cases where the court order apportions a percentage of the retirement benefit, OPM will initially determine the amount of the proper payment and increase that amount by future cost-of-living increases. In your case, the court decree requires us to withhold \$634.30 from your annuity for payment to your former spouse.

The Office of Personnel Management is bound under 5 U.S.C. 8345(j), to honor the decree as a qualifying court order within the meaning of 5 CFR 831.1704.

With respect to your contention that the judgment by the State of Arizona, which ruled in favor of Mrs. Pendergrass, is unconstitutional etc., such points can only be decided by courts of law, not the Office of Personnel Management. Your administrative remedies for contesting the rulings of the courts have been exhausted through appeal to the Court of Appeals, State of Arizona, and

through your petition to the United States Supreme Court.

In view of the above, the decision of October 11, 1985 is affirmed. This constitutes the final reconsideration decision of the Office of Personnel Management on this matter. You have the right to appeal this decision to the Merit Systems Protection Board. The enclosed sheet provides instructions on how to file an appeal. A copy of MSPB's regulations is also enclosed. Please note the twenty (20) day time limit to appeal.

Sincerely,

R. Williams

for Michael W. Sunner, Chief

Reconsideration and Debt

Collection Division

Enclosure

cc: Mrs. Bertha Pendergrass

3132 Lake Villa Drive

Metairie, LA 70002

APPENDIX F

